

## REMARKS

### State of the Claims

Claims 1-18, 22 and 23 are pending. Claim 14 has been canceled without prejudice. Claim 1 has been amended to provide the proper antecedent basis for Claim 16. New Claims 24-26 have been added. New Claims 24-26 claim a stack of nested snack pieces and the propensity of each snack piece within the stack to limit linear and rotational motion within the stack; i.e., "motion control." New Claims 24-26 are fully supported within the specification, and no new matter has been added. In fact, support for new Claims 24-26 can be found from page 13, lines 12-29 to page 15, lines 1-18, and also in Figure 11 of the specification.

### 37 CFR § 1.131 Affidavit

The 37 CFR § 1.131 Affidavit filed by Applicants on June 2, 2003 has been considered but has been determined by the Examiner to be ineffective to overcome U.S. Patent No. U.S. Patent No. 6,412,397 (McNeel, et al.) and U.S. Patent No. 6,472,007 (Bezek, et al.). The Examiner states that the "declaration provides evidence of a bowl-shaped snack piece, as illustrated in Exhibit B, but does not provide evidence for the claimed snack piece curved about [a] single axis."<sup>1</sup> [Emphasis added.] The Examiner cites Mergenthaler v. Scudder as providing the proper legal basis for his decision.<sup>2</sup>

Applicants respectfully disagree with the Examiner and believe that their 37 CFR § 1.131 Affidavit, along with their exhibits, are sufficient and properly satisfy the requirements for an affidavit swearing behind a reference.

Also, Applicants assert that the Examiner has improperly and erroneously misconstrued Applicants' claims. The Examiner states that Applicants' invention is a "claimed snack piece curved about [a] single axis."<sup>3</sup> However, Applicants specifically do not claim a "single" axis but rather a first axis. Applicants' Claim 1 reads as follows:

1. A stackable, uniform snack piece having a dip containment region for containing a dip-condiment, said snack piece comprising:
  - a) a body curved about a first axis, said curvature of said body forming a dip containment region having an open end and a restricted end and wherein said first axis is not parallel to a side of said body, whereby said curved body restricts a dip

<sup>1</sup> Office Action dated 6/11/2003, Confirmation No. 3630, Art Unit 1761 (Examiner D. Becker).

<sup>2</sup> Mergenthaler v. Scudder, 11 App. D.C. 264, 1897 U.S. App. LEXIS 3124 (D.C. Cir. 1897).

<sup>3</sup> Office Action dated 6/11/2003, Confirmation No. 3630, Art Unit 1761 (Examiner D. Becker).

held on said snack piece from flowing out of the dip containment region of said snack piece in at least two directions.

Clearly, the term "single" is not present in Applicants' Claim 1. Furthermore, a single axis is nowhere claimed in any of Applicants' subsequent claims. Add to that that Applicants have not themselves referred to their first axis as a single axis during prosecution of this patent application, namely U.S. Patent Application No. 09/851,456. Lastly, a teaching by Applicants of a single axis is not present within their specification. Thus, Applicants point out that the Examiner has improperly applied a meaning to Applicants' claims that Applicants have not themselves claimed; namely, a "single" axis.

Therefore, Applicants request that the Examiner rescind this erroneous and improper ascription to Applicants' claims from the official record of prosecution.

Applicants respectfully assert that their affidavit along with their exhibits are sufficient to meet the requirements of a proper 37 CFR §1.131 Affidavit. In Applicants' affidavit, at Exhibit B exists a perspective view of Applicants' snack piece in the top right hand quadrant of Exhibit B (i.e., when looked at in landscape). In Applicants' formal drawings, namely, Figure 1, Applicants show their snack piece with all of the requisite call-outs required for a formal drawing. In particular, Applicants use call-out 'M' to denote their first axis about which the snack piece is curved.

Applicants contend that their snack piece shown in Exhibit B is substantially similar to their snack piece of Figure 1. Both figures show a snack piece in perspective view with the viewer looking at the pieces from rear to front. Both figures show "bowl-shaped" snack pieces. Both also show the snack pieces to be triangular. The only difference between the snack pieces, then, is that Figure 1 has its requisite call-outs while Exhibit B does not.

Applicants also point out that their snack piece in Exhibit B shows that they possessed their invention at a date before McNeel '397 and Bezek '007. Applicants also point out that their snack piece is curved, and in fact is curved about an axis. Since Applicants do not claim curvature about a "single axis", their drawing in Exhibit B does not show, by way of some call-out, this improperly assigned feature.

Applicants therefore respectfully request reconsideration and acceptance of their 37 CFR § 1.131 Affidavit as proper to swear behind McNeel '397 and Bezek '007.

#### Information Disclosure Statement

The Examiner states that the IDS filed on October 1, 2001 fails to comply with the provisions of 37 CFR §§1.97, 1.98 and MPEP § 609 because the three Sample references do not include dates, i.e., dates of their first marketing.

Applicants note that Applicant's Attorney was unable to provide the "publication" dates of the non-patent references because each of the references is a sample of competitive product having its origin outside of the control of Applicant's Assignee, namely, Procter & Gamble. Further, Applicant's Attorney is not privy to the internal release dates of competitive product. That being said then, the only "control" or knowledge that Applicants can reasonably be expected to hold is to ascertain whether the listed products existed in the public forum before the filing date of Applicants' application. Applicants determined that the listed products were in fact on sale before Applicants' filing date and in proper compliance with 37 C.F.R. § 1.56 listed the products in Applicants' Information Disclosure Statement.

Accordingly, Applicants believe that their IDS should be accepted and deemed proper by the Examiner.

#### 35 U.S.C. § 112 Rejection

Claim 22 stands rejected under 35 U.S.C. § 112, first paragraph, as containing subject matter that was not described in the specification in such a way as to enable one of skill in the art to make or use the invention. Specifically, the Examiner asserts that the term "engagement span" is not described by the specification, nor does the specification teach how to calculate the engagement span.

Applicants respectfully disagree with the Examiner. Applicants contend that the engagement span is described both in the specification and in the figures of the specification. For example, Applicants describe the engagement span in the disclosure itself.<sup>4</sup> Therein, the engagement span is described as calculable from certain percentages of the vertex span that is useful to help obtain the optimal orientation of the axis of curvature of the chip.<sup>5</sup> The vertex span is also properly defined and disclosed in the specification.<sup>6</sup>

Furthermore, the location and orientation of the engagement span are shown in Figures 3a, 3b, 3c, and 3d. In each figure, the engagement span is shown as being geometrically similar

<sup>4</sup> Applicants' Specification at page 9, lines 16-23.

<sup>5</sup> Id. at page 9, lines 21-24; (i.e., "The engagement span is about 90% of the vertex span, more preferably about 70%, most preferably about 50%...")

<sup>6</sup> Id. at page 9, lines 18-23.

to the vertex span. Also, Applicants respectfully assert that 90% of any calculated number (i.e., the vertex span) is readily calculable, and one of skill in the art would know how to calculate 90% of that number; namely, through multiplication of 0.90 times the vertex span. Thus, the engagement span is in fact described and defined and its calculation is readily ascertainable by one of skill in the art; i.e., "the engagement span is 90% of the vertex span..."<sup>7</sup>

Applicants therefore respectfully request reconsideration and allowance of Claim 22 over the Examiner's 35 U.S.C. § 112, first paragraph, rejection.

Claims 9, 14, 16 and 22 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as their invention.

In Claim 9, the Examiner points out that the phrase "said restricted end" lacks the proper antecedent basis. Applicants have amended Claim 1 to supply the terms, thus obviating the lack of antecedent basis in Claim 9. Applicants therefore request reconsideration and allowance of Claim 9 over the Examiner's 35 U.S.C. § 112, second paragraph, rejection.

In Claim 14, the Examiner asserts that the term "said nested arrangement is consistent" is unclear. Claim 14 has been canceled without prejudice, thus obviating the Examiner's 35 U.S.C. § 112, second paragraph, rejection.

In Claim 16, the Examiner states that the limitation "said restricted end" lacks sufficient antecedent basis. Claim 1 has been amended to add the term "restricted end", thus providing the proper antecedent basis to Claim 16. Therefore, Applicants request reconsideration and allowance of Claim 16 over the Examiner's 35 U.S.C. § 112, second paragraph, rejection.

In Claim 22, the Examiner again asserts that it is not clear what an engagement span is or how it is calculated.

Applicants respectfully disagree with the Examiner. Applicants contend that the engagement span is described both in the specification and in the figures of the specification. For example, Applicants describe the engagement span in the disclosure itself.<sup>8</sup> Therein, the

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<sup>7</sup> Id. at page 9, lines 21-24

<sup>8</sup> Applicants' Specification at page 9, lines 16-23.

engagement span is described as being certain percentages of the vertex span that is useful to help obtain the optimal orientation of the axis of curvature of the chip.<sup>9</sup>

Furthermore, the location and orientation of the engagement span is shown in Figures 3a, 3b, 3c, and 3d. In each figure, the engagement span is shown as being geometrically similar to the vertex span. Also, Applicants respectfully assert that 90% of any calculated number (i.e., the vertex span) is readily calculable, and one of skill in the art would know how to calculate 90% of that number; namely, through multiplication of 0.90 times the vertex span.

Thus, Applicants describe their "engagement span" in their specification and make known to one of skill in the art how to calculate the engagement span which is some percentage of the vertex span.

Therefore, Applicants respectfully request reconsideration and allowance of Claim 22 over the Examiner's 35 U.S.C. § 112, second paragraph, rejection.

#### 35 U.S.C. § 102 Rejection

Claims 1-4, 9, 12, 16-17 and 22 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Hreschak (U.S. Design Patent No. 212,070).

The Examiner states that Hreschak '070 teaches a snack product comprising a body curved about a first axis thus forming a dip containment region with an open end, sides that are not parallel to the axis, restriction of movement to the sides and rear, an engagement span that is 90% of the vertical span, the axis being perpendicular to the open end, sidewalls, a restricted end that is less than 75% of the open width, a vertical taper of less than 45°, and a varying radius of curvature along its length (see Figures 1-4).

According to MPEP § 2131 a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. The identical invention must be shown in as complete detail as is contained in the claim. The elements must be arranged as required by the claim.

The Examiner states that the recitation "stackable" has not been given patentable weight because the recitation occurs in the preamble. He further states that a preamble is generally not accorded patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble

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<sup>9</sup> Id. at page 9, lines 21-24; (i.e., "The engagement span is about 90% of the vertex span, more preferably about 70%, most preferably about 50%...")

for completeness, but instead steps or structural limitations are able to stand alone. The Examiner concludes by stating "regardless, nearly any snack product, including Hreschak [070] would be capable of being stacked in some manner, for instance in a pile."

Applicants assert that the Examiner has improperly not considered Applicants' preamble and also has misapplied legal precedent as a basis for that lack of consideration. A claim preamble has the import that the claim as a whole suggests for it.<sup>10</sup> If the claim preamble, when read in the context of the entire claim, recites limitations of the claim, or, if the claim preamble is necessary to give life, meaning, and vitality to the claim, then the claim preamble should be constructed as if in the balance of the claim.<sup>11</sup> And further, any terminology in the preamble that limits the structure of the claimed invention must be treated as a claim limitation.<sup>12</sup>

Herein, the term "stackable", which was previously added to the preamble of Claim 1 is a term that should have been considered by the Examiner because it further limits the scope of Claim 1. Applicants assert that the "stackable" limitation is necessary to give life, meaning and vitality to the claim and in particular further describes the snack piece; i.e., exactly the type and kind of snack piece--"a stackable, uniform snack piece." The inclusion of the term "stackable" is well-supported throughout the specification and should be fully considered as part of Claim 1 and a limitation to Claim 1.

Regarding Hreschak 070, the snack pieces thereof are not stackable or meant to be stacked. The folded finger portion 34 that resides at the end of Hreschak's food product would render stacking of his product impossible, because the folded finger portion 34 could not in fact be stacked one on top of another.<sup>13</sup> In contrast, Applicants' entire snack piece can be stacked and placed into a nested arrangement for packaging into a container designed for such an arrangement.<sup>14</sup>

Applicants' stackable feature is not taught or shown by Hreschak 070; nor is it inherently derived from Hreschak's figures or disclosure. Also, the Examiner does not point to any teaching within Hreschak 070 that shows that the snack pieces of Hreschak 070 can be

<sup>10</sup> *Bell Communications Research, Inc. v. Vitalink Communications Corp.*, 55 F.3d 615, 620, 34 USPQ2d 1816, 1820 (Fed. Cir. 1995).

<sup>11</sup> *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1305, 51 USPQ2d 1161, 1165-66 (Fed. Cir. 1999).

<sup>12</sup> *Corning Glass Works v. Sumitomo Elec. U.S.A., Inc.*, 868 F.2d 1251, 1257, 9 USPQ2d 1962, 1966 (Fed. Cir. 1989).

<sup>13</sup> U.S. Design Patent No. 212,070 (Hreschak) at Figure 5.

<sup>14</sup> Applicants' Specification at page 16, lines 19-24; and Figures 12, 14 and 15.

stacked. As such, it is a missing element that cannot be properly included in a rejection against Applicants' claims based upon anticipation.

Applicants therefore respectfully request reconsideration and allowance of Claims 1-4, 9, 12, 16-17 and 22 over the Examiner's 35 U.S.C. § 102(b) rejection.

Claims 1-5, 8-9, 12-14, 17-18 and 22 stand rejected under 35 U.S.C. § 102(e) as being anticipated by McNeel, et al. (U.S. Patent No. 6,412,397).

Filed in a previous response dated May 29, 2003 is a 37 CFR § 1.131 Affidavit that swears behind the earliest filing date of McNeel '397, namely February 7, 2000. Applicants certify, by way of the Affidavit, that they were in possession of their invention before the above date. Also, several arguments for the proper inclusion of the Affidavit are noted herein above.

Applicants therefore respectfully request reconsideration and allowance of Claims 1-5, 8-9, 12-14, 17-18 and 22 over the Examiner's 35 U.S.C. § 102(e) rejection.

#### 35 U.S.C. § 103 Rejection

Claims 10-11 and 15 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hreschak '070. The Examiner notes that Hreschak '070 does not teach a length of 30 - 110mm, a radius of curvature of 15 - 500mm, or an open width of 15 - 75mm.

To establish a prima facie case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference must teach or suggest all of the claim limitations. (MPEP § 2142).

Applicants point out that not only does Hreschak '070 not teach Applicant's radius of curvature ranges, but also, Applicants contend that Hreschak '070 does not teach or suggest Applicant's snack piece having a body curved about a first axis, the curvature of the body forming a dip containment region. In fact, the snack piece of Hreschak '070 shows merely a flattened main surface with a pinched, elevated portion at one end of the snack piece and no dip containment region within a curved region of the snack.<sup>15</sup>

Applicants therefore respectfully assert that Hreschak '070 teaches away from Applicants' snack piece since a flattened snack piece without a dip containment region within a

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<sup>15</sup> U.S. Design Patent No. 212,070 (Hreschak), Figure 4.

curved region of the snack does not teach or suggest Applicants' curved dip containment region, and one of skill in the art looking at Hreschak '070 would not be motivated to produce Applicants' curved chip from Hreschak's flattened chip.

Thus, Applicants respectfully request reconsideration and allowance of Claims 10-11 and 15 over the Examiner's 35 U.S.C. § 103(a) rejection.

Claims 10-11 and 15 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over McNeel '397.

As noted previously, a 37 CFR § 1.131 affidavit has been filed herein previously that swears behind McNeel's earliest filing date of February 7, 2000. Therefore, the Examiner's rejection is obviated and should be withdrawn as to the above-listed claims in view of McNeel '397.

Applicants therefore request reconsideration and allowance of Claims 10-11 and 15 over the Examiner's 35 U.S.C. § 103(a) rejection.

Claims 5 and 8 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hreschak '070 in view of McNeel '397.

Applicants contend that the combination of Hreschak '070 and McNeel '397 is improper. Applicants have filed a 37 CFR § 1.131 affidavit that swears behind McNeel's earliest filing date of February 7, 2000, thus removing McNeel '397 as a viable reference against Applicants' claim. Also, as noted above, Applicants contend that Hreschak '070 teaches away from Applicants' snack piece. Thus, the combination of Hreschak '070 in view of McNeel '397 is improper.

Applicants believe that the Examiner's rejection herein is obviated both by Applicant's '131' Affidavit and by Hreschak's teaching away as noted hereinabove. Applicants therefore respectfully request reconsideration and allowance of Claims 5 and 8 over the Examiner's 35 U.S.C. § 103(a) rejection.

Claims 5-7 and 23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hreschak '070 in view of Blish [Des. 166,524].

Applicants believe that the combination of Hreschak '070 in view of Blish '524 is improper.

As noted herein previously, Applicants respectfully contend that the design of Hreschak '070 teaches away from Applicants' stackable snack piece. Such teaching away is not cured by the combination of Hreschak '070 in view of Blish '524, because Hreschak's teaching away from Applicants' invention removes it as a viable reference in any obviousness rejection, singly or in combination with one or more references.

Hence, Applicants respectfully request reconsideration and allowance of Claims 5-7 and 23 over the Examiner's 35 U.S.C. § 103(a) rejection.

Claims 6-7 and 23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over McNeel '397 in view of Blish '524.

Applicants contend that the combination of McNeel '397 in view of Blish '524 is improper. Applicants have filed a 37 CFR § 1.131 affidavit that swears behind McNeel's earliest filing date of February 7, 2000, thus removing McNeel '397 as a viable reference against Applicants' claims.

Applicants therefore request reconsideration and allowance of Claims 6-7 over the Examiner's 35 U.S.C. § 103(a) rejection.

Claims 13-14 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Hreschak '070 in view of Bezek (U.S. Patent No. 6,472,007).

As noted herein previously, Applicants respectfully contend that the design of Hreschak '070 teaches away from Applicants' snack piece for all of the reasons noted hereinbefore. Such teaching away is not cured by the combination of Hreschak '070 in view of Bezek '007, because Hreschak's teaching away from Applicants' invention removes it as a viable reference in any obviousness rejection, singly or in combination with one or more references. Also, Applicants have filed a 37 CFR § 1.131 affidavit that swears behind Bezek's earliest filing date of February 7, 2000, thus removing Bezek '007 as a viable reference against Applicants' claims.

Applicants therefore respectfully request reconsideration and allowance of Claims 13-14 over the Examiner's 35 U.S.C. § 103(a) rejection.

Claim 18 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Hreschak '070 in view of Ipema [Des. 300,199].

As noted herein previously, Applicants respectfully contend that the design of Hreschak '070 teaches away from Applicants' snack piece for all of the reasons noted hereinbefore. Such teaching away is not cured by the combination of Hreschak '070 with Ipema '199, because Hreschak's teaching away from Applicants' invention removes it as a viable reference in any obviousness rejection, singly or in combination with any other reference.

Applicants therefore request reconsideration and allowance of Claim 18 over the Examiner's 35 U.S.C. § 103(a) rejection.

Claim 16 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over McNeel '397 in view of Hreschak '070.

Applicants contend that the combination of McNeel '397 in view of Hreschak '070 is improper. Applicants have filed a 37 CFR § 1.131 affidavit that swears behind McNeel's earliest filing date of February 7, 2000, thus removing McNeel '397 as a viable reference against Applicants' claims. Also, as noted above, Applicants contend that Hreschak '070 teaches away from Applicants' snack piece. Thus, the combination of McNeel '397 in view of Hreschak '070.

Applicants therefore request reconsideration and allowance of Claim 16 over the Examiner's 35 U.S.C. § 103 rejection.

**SUMMARY**

All of the rejections in the Office Action have been discussed as have the distinctions between the above cited references and the claimed invention.

In light of the discussions contained herein, Applicants respectfully request reconsideration of the rejections and their withdrawal, and all of the claims allowed.

Issuance of a Notice of Allowance at an early date is earnestly solicited.

Respectfully submitted,

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